

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



Appeal No. 15941 of American University Park Citizens Association, Spring Valley-Wesley Heights Citizens Association and the Concerned Citizens Coalition, pursuant to 11 DCMR 3105.1 and 3200.2, from the decision of Joseph F. Bottner, Zoning Administrator made on December 29, 1993, to the effect that a building permit will issue authorizing conversion of a building to a law school in a C-2-A District at premises 4801 Massachusetts Avenue, N.W. (Square 1499, Lot 806).

HEARING DATE: May 18, 1994  
DECISION DATE: June 1, 1994

ORDER

The subject appeal involves the property located at 4801 Massachusetts Avenue, N.W. (Square 1499, Lot 806). The property is zoned C-2-A and is currently owned by Aetna Life Insurance Company. The American University (AU) is the contract purchaser of the property for use as a law school.

The Board of Zoning Adjustment ("BZA" or "The Board") approved the revised campus plan of the American University in BZA Application No. 14640. The Board also approved a special exception for further processing of the Washington School of Law of the American University in Application No. 15109. These applications were consolidated into one order, dated February 21, 1990. For the new law school, American University had determined to use the Cassell site at 4400 Massachusetts Avenue, N.W., subject to certain controls delineated in an agreement with a number of neighborhood associations, among them, the American University Park Citizens Association ("AU Park"), and the Spring Valley-Wesley Heights Citizens Association ("SVWHA") both of which are appellants in this case. However, on May 18, 1992, American University filed for a building permit to locate the law school at the subject site at 4801 Massachusetts Avenue, N.W. The Zoning Administrator denied the permit on the grounds that AU must comply with Condition No. 5 of the Board's Order approving the campus plan (which includes the law school). Condition No. 5 incorporated into the Board's order an agreement between AU and a number of community organizations. In this agreement, AU agreed not to "request approval of any building, other than the presently proposed law school building, ... unless a new campus plan ... is submitted to the BZA."

Relying on this condition, in a letter to the University dated May 26, 1992, the Zoning Administrator (ZA) expressed the opinion that AU would need to submit an amended campus plan to the Board to change the location of the law school from Cassell to the new site.

The University disagreed with this position and requested that the Board clarify the condition. The University's position was that the condition does not apply to property that is commercially zoned and not included in the campus plan. Therefore, the University did not apply for an amendment to the campus plan. At its public meeting of July 8, 1992, the Board approved the motion for clarification and issued an order dated July 31, 1992. The final paragraph in the Board's clarification order, stated that "the conditions cited in the Board's order, dated February 21, 1990, apply only to the residentially-zoned property located within the boundaries of the approved campus plan."

On July 27, 1993, American University filed a new application for a certificate of occupancy to place the law school at 4801 Massachusetts Avenue, N.W. On December 29, 1993, Building Permit No. B384751 was issued authorizing "minimum alteration and repair of existing interiors to accommodate 1,200 students and 60 faculty including electrical and fire protection systems to bring existing building to code compliance as per drawings." The structure is to be occupied as a "law school."

Before this permit was issued, neighborhood organizations expressed concerns about the use of the site without their input. On September 30, 1993, Councilmember James Nathanson, Ward 3 representative, requested that the Zoning Commission consider amending the campus plan regulations to require that any relocation of a major use within or outside the campus plan, even matter-of-right uses, be subjected to BZA review and approval. The Office of Planning and Advisory Neighborhood Commission 3F recommended that the Zoning Commission schedule a public hearing on the matter.

At its regular monthly meeting of January 10, 1994, the Zoning Commission considered the petition, support and opposition statements, and decided to deny the petition without a hearing. In its decision (Z.C. Order No. 752, effective March 4, 1994), the Zoning Commission stated:

The Zoning Commission believes that the present campus plan review and control process provides strong public controls which mandate participation by neighbors of universities.

The Zoning Commission further believes that the petition, as filed, does not have sufficient merit to warrant the authorization of a public hearing, is not in the best interest of the District of Columbia, and is inconsistent with the intent and purpose of the Zoning Regulations and the Zoning Act.

On the same date as the Zoning Commission meetings, the American University Park Citizens Association, the Spring Valley-Wesley Heights Citizens Association and the Concerned Citizens Coalition filed this appeal with the Board challenging the December 29, 1993 decision of the Zoning Administrator to issue Building Permit No. B-384751 authorizing conversion of 4801 Massachusetts Avenue, N.W. from a retail facility to a law school.

The appellants allege that the Zoning Administrator's decision is in error in three main respects:

- (1) The Zoning Administrator approved the use without requiring an amendment to the University's campus plan;
- (2) The Zoning Administrator relied on erroneous facts in determining that an environmental impact analysis was not needed; and,
- (3) The Zoning Administrator issued the permit without requiring American University to provide adequate parking.

#### The Need for BZA Review of an Amended Campus Plan

The appellants, through their counsel, argued that the original BZA Order approving the campus plan incorporated the agreement between the University and the community associations, and required the University to amend its campus plan before it could receive building permits on plans different from that which was approved by the Board. The appellants argued that the Zoning Administrator erred in issuing the building permit, dated December 29, 1993, allowing American University to locate the law school at 4801 Massachusetts Avenue, N.W. because an amendment to the campus plan was not first required. The appellants maintained that the issue that is properly before the Board is, at what point in time must an amendment be made to a campus plan where changes are sought? The appellants maintain that this issue has not been addressed by the Board.

At the public hearing on this appeal, American University stated that it is the contract purchaser of the subject property and noted its appearance as an intervenor in this case. Counsel for the University argued that the issue raised by the appellants related to amending the campus plan is not properly before this Board. The University maintains that the Board's clarification order resolved this matter when it held that Condition No. 5 does not apply to commercially zoned property. The matter is res judicata and should not be considered in this proceeding. The University also noted that the Zoning Commission declined to amend the Zoning Regulations to require campus plan amendments for uses allowed as a matter-of-right.

The Board considered the arguments of both parties. The clarification order and Zoning Commission Order No. 752 ruled that the issue of whether an amendment to the campus plan must be filed in the present circumstances has been settled in the Board's clarification order and by the Zoning Commission. The Board is of the view that because this issue has already been addressed and settled, it is not properly before the Board. The Board is further of the opinion that the instant case does not raise the issue of when an amendment must be filed since no such filing is required.

#### Environmental Impact Analysis

The appellants argued that the Zoning Administrator erred by holding that the proposed conversion of the site to a law school would not result in a substantial and imminent impact on the safety and health of the citizens residing near it. The appellants stated that while an environmental impact review is necessary for issuance of a building permit, the Zoning Administrator relied on erroneous information in the environmental review for this site. At the hearing, the appellants sought to present factual evidence to demonstrate that the use would not comply with the statute regulating environmental impact.

The University argued that the decision about environmental impact was made by Hampton Cross, Acting Director of the Department of Consumer and Regulatory Affairs, not the Zoning Administrator. The Board does not have jurisdiction over this decision because it is not based on the Zoning Regulations. Therefore, the University argued, this matter is not properly before the Board.

The Director of the Office of Zoning noted that decisions on environmental impact can be appealed to the Board of Appeals and Review, not the BZA.

The Board determined that because the environmental impact provisions are not derived from the Zoning Regulations, this issue is not proper for the Board to consider.

#### Parking

The remaining issue raised by the appellants relates to the parking proposed by American University. The appellants argued that the Zoning Administrator erroneously approved the building permit because the parking proposed by the University is inadequate to meet the requirements of the Zoning Regulations.

They testified that the Zoning Administrator primarily based his calculations on information presented to him in the building permit application from the University. He assumed that the number of teachers would be 60, and with the Zoning Regulations requiring two spaces for every three teachers, he determined that 40 spaces

would be needed. The Zoning Administrator also determined that with 1,200 students, 120 parking spaces would be required for a grand total of 160 spaces.

The appellants testified that the Zoning Administrator's calculations are in error because the number of parking spaces should total at least 239 based on the following information:

- There would be 80 full-time teachers and 40 part-time teachers, totalling 120 teachers. Using the 2:3 ratio, 80 spaces would be required.
- There would be a staff of 65 other employees, requiring 42 spaces.
- There would be 1,117 seats (for students). Using the 10:1 ratio, (i.e., one parking space for every 10 classroom seats), 117 spaces would be required, for a grand total of 239 spaces for the law school.

The appellants offered another alternative calculation based on the University's most recent catalog. The catalog lists 245 faculty members. Using the 2:3 ratio, 163 spaces would be required. Adding the 163 to the 117 spaces for the number of seats, there would be a total of 280 spaces. The appellants noted that this number does not take into consideration the additional parking load that would be required for non-faculty staff.

The appellants testified that another computation is based on the fall 1993 numbers for employees which lists 101 full-time and 235 part-time employees, for a total of 236 staff members for the law school. Using the 2:3 ratio, 157 required spaces would result. If the 157 spaces are added to the 117 spaces, the total would be 274 parking spaces.

The appellants argued that these calculations yield a greater number of parking spaces than the 207 legal spaces available in the building. They noted that the Zoning Administrator erred by not requiring enough parking spaces at the new site.

The Zoning Administrator testified that on July 27, 1993, a certificate of occupancy application was filed requesting the use of 4801 Massachusetts Avenue as a university/academic institution of higher learning with a maximum of 1,200 students and 60 teachers.

On November 16, 1993, a repair permit application was filed to provide minimum alterations and repairs to the interior of the property to accommodate the law school for 1,200 students and 60 faculty members. The application was approved and building permit No. R-384751 was issued on December 29, 1993.

Considering that the property is in a C-2-A zone, which allows a university as a matter-of-right, and considering the facts in this case, the Zoning Administrator stated that he had no choice but to approve the proposed use for the law school for 1,200 students and 60 faculty members. He stated that no occupancy permit would be issued until the building is in compliance with the D.C. construction code, the fire code, and the D.C. Zoning Regulations.

The Zoning Administrator testified that a question was raised about off-street parking requirements for the proposed law school, as well as the retail stores at the site. His determination of parking requirements was based on the information presented to him by the applicant, American University, and also in Chapter 21 of the D.C. Zoning Regulations (11 DCMR).

He testified that in Chapter 21, parking requirements for an institution of higher learning, such as American University, are based on the numbers of teachers and classroom seats. There must be one space for each 10 classroom seats, and two spaces for every three teachers. There is no citation in the Zoning Regulations that parking be required for staff or custodial personnel.

The Zoning Administrator testified that in reviewing applications for building or occupancy permits, the figures placed on the applications indicate the maximum number of people that would be expected on the premises at any one time. In this case, it would be the number of students and teachers expected at one time. Therefore, he did not consider other personnel in calculating the required parking.

The parking within the new garage section of 4801 Massachusetts Avenue would be re-stripped in accordance with the Zoning Regulations, whereby the University is required to provide a total of 160 spaces - 40 for the number of teachers and 120 for the number of classroom seats.

The American University testified as a representative of the property owner, Aetna Life Ins., Co. The University testified regarding the manner in which the parking spaces were calculated, how many would be provided, and where they would be located.

Mr. Sher, testifying on behalf of American University, pointed out that Subsection 2118.3 of the Zoning Regulations provides as follows:

2118.3     The number of teachers or employees shall be computed on the basis of the greatest number of persons to be employed at any one period during the day or night, including persons having both full-time and part-time employment.

Mr. Sher noted that the focus should not be on the total number of teachers listed in the University catalog. Rather, the focus should be placed on the maximum number of teachers likely to be inside the school at any given time.

Mr. Sher presented an affidavit from Andrew Popper, professor of law and deputy dean of the law school, as evidence of the maximum number of teachers likely to be in the school. The affidavit of Mr. Popper provided the following information:

- In the 1994 spring semester the law school had 44 full-time faculty, including five administrators who also teach. In addition, there were 102 teaching adjunct faculty, for a total of 146 faculty members.
- The vast majority of adjuncts are practicing lawyers and judges who have full-time employment outside the law school. Many adjuncts are at the law school one day a week for two hours at a time. There are 55 adjuncts who teach substantive upper-level courses, 29 who teach legal writing, and 17 trial practice instructors. On a daily basis, there are six legal writing teachers and four trial practice teachers.
- The law school presently has nine spaces for teaching, including classrooms, seminar rooms, and courtrooms.
- In these rooms, the maximum number of full-time and adjunct teachers in class at any one time in the 1994 spring semester was 14, when every teaching space was in use and one out of every two classes was taught by two teachers.
- There could be a maximum of 44 teaching faculty members in the law school who would be in their offices engaged in regular professional activity outside of the classroom. Accordingly, a maximum of 58 teachers could be in the building at one time. This includes those in their offices, in meetings, in the library, or in classrooms.
- The maximum number of faculty members on site actually occurred during monthly faculty meetings, where the maximum number at the law school was between 52 and 55.
- Normally, approximately half of the full-time faculty (i.e., 22 people) are in the building and engaged in office activity outside the classroom at any one time.
- In the law school catalog, there is a listing of full-time and adjunct faculty. The catalog listing includes teachers who have been on the adjunct faculty at any time in the last three years.

- Like most law schools, the number of teachers on the faculty and qualified to teach is many times greater than the number of faculty who are actually at the law school at any one time.
- In the new facility at 4801 Massachusetts Avenue, N.W., teaching assignments and utilization of classroom space is not planned to change significantly.
- The law school at 4801 Massachusetts Avenue, N.W., as shown on the plans submitted with the permit application, would not have more than 60 teachers on the premises at any one time.

Mr. Sher stated that adjuncts do not have offices and do not attend faculty meetings. When they need to meet with students, they simply use whatever space is available.

Mr. Sher testified that AU is required to have 160 parking spaces total. Forty spaces are required based on two-thirds of the 60 maximum teachers on the premises. He testified that there would be 1,280 classroom seats, requiring 120 parking spaces. He stated that AU proposes to provide 185 parking spaces, 25 more than required. He noted that even if there were 37.5 more teachers, there would be adequate parking to meet the Zoning Regulations.

Mr. Sher testified that the 185 spaces would be full-size legal 9 X 19 spaces. These spaces would be provided in the three cellar levels of the property. They would not be in the vaulted area and are not the spaces accessible only through public space.

Advisory Neighborhood Commission (ANC) 3E submitted a report, dated May 11, 1994, expressing support for the subject appeal. At item (e) of the report, the ANC stated that it has the following issues and concerns:

"Traffic and parking, impact on the residential neighborhood; need for an environmental impact review; and abrogation of the campus plan."

The Chairperson of ANC 3C testified regarding the impact that locating the law school at this site will have on parking conditions in the neighborhood. The ANC is concerned that parking demand will overflow onto neighborhood streets all week long.

The remaining testimony of ANC 3D addressed matters not at issue before this Board. These include the appropriateness of locating the law school at this site and the need for a campus plan amendment.



A neighbor who was formerly an ANC Commissioner and who resides at 4640 Windom Place, N.W. testified in support of the appeal. He challenged the legality of the permit due to Aetna Life Insurance Companys lack of standing to apply for a permit. Secondly, he maintained that granting the permit is contrary to the public interest of the District of Columbia. He concurred with the statements made by the appellants about the parking. He stated that the proposal will have a major negative impact on the residential and commercial neighborhood and will deprive the city of property, sales, and income tax revenue.

No other persons or parties appeared at the hearing to testify in the appeal. The record was closed except to receive proposed findings of fact. The decision date was set for June 1, 1994.

By letter dated July 7, 1995, the appellants moved that the Board waive its rules and reopen the record in this appeal. The appellants maintain that the plans relied on by the Zoning Administrator are materially different from those which the University actually proposes.

By letter dated July 14, 1995, the American University opposed the motion, stating that the issues raised relate to a second permit which is not the subject of this appeal.

ANC 3D submitted a letter, dated July 18, 1995, in support of the motion to reopen the record.

Subsection 3330.2 of the Zoning Regulations provides as follows:

3330.2 Prior to the filing of a final decision, the Board may on its own motion, reopen the record and require further hearing on designated issues before the Board.

At its public meeting of September 6, 1995, the Board declined to reopen the record on its own motion and denied the appellants' request to waive the rules and reopen the record.

The Board noted that the final order in this case had not been issued and if the appellants would like further review of this case, they could file a motion for reconsideration or rehearing after the order is issued. Therefore, the Board **DENIED** the motion by a vote of 3-0 (Craig Ellis, Susan Morgan Hinton and Angel F. Clarens to deny the request for waiver and the motion to reopen the record; Laura M. Richards not voting, having recused herself; Mrs. Hinton read the record to participate in the decision).

ISSUE:

The only issue raised in this appeal is whether the Zoning Administrator erred in issuing a permit for a law school with 185 parking spaces proposed?

FINDINGS OF FACT:

The Board makes the following findings of fact:

1. The ZA properly relied on the information presented in the building permit application related to the number of teachers and classroom seats.
2. The number of parking spaces proposed by American University will be adequate to meet the requirements of the Zoning Regulations.

CONCLUSIONS OF LAW AND OPINION:

The subject appeal addresses the limited issue of whether the Zoning Administrator erred in issuing a building permit to allow a law school use in a C-2-A District where 185 parking spaces will be provided. The Board concludes that the Zoning Administrator correctly interpreted the Zoning Regulations by focusing on the maximum number of teachers likely to be on site at one time rather than the number of teachers listed in the law school catalog.

The Board concludes that the Zoning Administrator accurately determined that 160 spaces would be required based on the number of teachers and classroom seats. The Board further concludes that the minimum of 185 parking spaces proposed by American University will meet the parking requirements set forth in the Zoning Regulations. Consequently, the Zoning Administrator's decision to approve the building permit for this matter-of-right use was not made in error.

In light of the foregoing, the Board concludes that the APPEAL is DENIED and the decision of the Zoning Administrator is UPHELD.

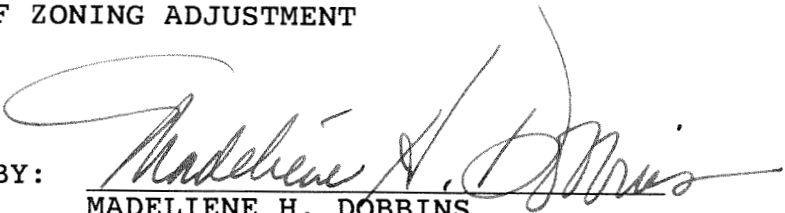
VOTE: 4-0 (Craig Ellis and George Evans to deny; Angel F. Clarens and William B. Johnson to deny by absentee vote; Laura M. Richards not voting, having recused herself).

THIS ORDER WAS ISSUED AS A PROPOSED ORDER PURSUANT TO THE PROVISIONS OF D.C. CODE SECTION 1-1509(d). THE ORDER WAS SENT TO ALL PARTIES ON MAY 28, 1997. THE FILING DEADLINE FOR EXCEPTIONS AND ARGUMENTS WAS JUNE 23, 1997. NO PARTY TO THIS APPLICATION FILED EXCEPTIONS OR ARGUMENTS RELATING TO THE PROPOSED ORDER, THEREFORE, THE BOARD OF ZONING ADJUSTMENT ADOPTS AND ISSUES THIS ORDER AS ITS FINAL ORDER IN THIS CASE.

BZA APPLICATION NO. 15941  
PAGE NO. 11

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY:

  
MADELIENE H. DOBBINS  
Director

FINAL DATE OF ORDER: \_\_\_\_\_

JUL 8 1997

PURSUANT TO D.C. CODE SEC. 1-2531 (1987), SECTION 267 OF D.C. LAW 2-38, THE HUMAN RIGHTS ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED, CODIFIED AS D.C. CODE, TITLE 1, CHAPTER 25 (1987), AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF APPLICANT TO COMPLY WITH ANY PROVISIONS OF D.C. LAW 2-38, AS AMENDED, SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF TWO YEARS, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

ord15941/TWR/LJP

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



BZA APPEAL NO. 15941

As Director of the Board of Zoning Adjustment, I hereby certify and attest that on JUL 8 1997 a copy of the order entered on that date in this matter was mailed first class, postage prepaid to the appellants, appellees and intervenors who appeared and participated in the public hearing concerning this matter, and who is listed below:

Everett C. Carter  
10509 Unity Lane  
Potomac, Maryland 20854

Stephen Posniak  
4640 Windom Place, N.W.  
Washington, D.C. 20016

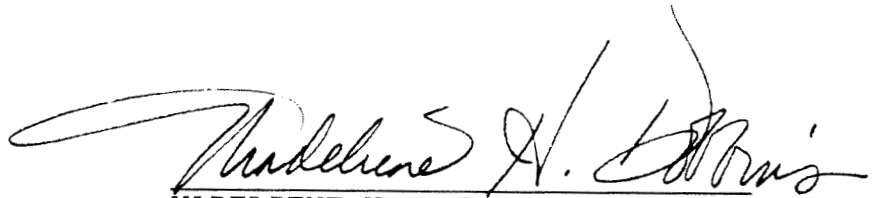
Maureen E. Dwyer, Esquire  
Steven E. Sher  
Wilkes, Artis, Hedrick and Lane  
1666 K Street, N.W., Suite 1100  
Washington, D.C. 20006

Beth Kravetz, Chairperson  
Advisory Neighborhood Commission 3E  
P.O. Box 9953  
Friendship Station  
Washington, D.C. 20016

Sheldon Repp  
4704 Windom Place, N.W.  
Washington, D.C. 20016

Ann Stevens Kelly  
4300 47th Street, N.W.  
Washington, D.C. 20016

Beth Kravetz  
4226 40th Street, N.W.  
Washington, D.C. 20016

  
MADELIENE H. DOBBINS  
Director

Date: JUL 8 1997